IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

CIVIL FIRST APPEAL No. 28 of 1986

RAM GOPAL
V/S
MST.SODRA

Mr. BALARAM KUMAWAT, for the appellant / petitioner

Mr. RR NAGORI, for the respondent

Date of Order : 17.8.2006

HON'BLE SHRI N P GUPTA,J.

ORDER

This appeal has been filed by the defendant No.1 against the judgment and decree of the learned Additional District Judge, Bikaner dated 26.2.86 passing a preliminary decree in a suit for partition, declaring the plaintiff and the defendant No.1 to be entitled to half to half share in the property, being the house situated at industrial area Rani Bazar, Bikaner, and open land situated outside Sodon Ki Bari, Bikaner, and appointing Shri Vikram Singh as Commissioner for effecting the partition by metes and bounds.

The facts of the case are, that the plaintiff-respondent filed a suit for partition, on 12.4.78, alleging inter-alia, that one Gogadevi Choudhary was the ancestor, who executed a Will on 8.3.63, appointing defendants No.2 to 5 as the executors. A probate of that Will was obtained

from the Court of District Judge, Bikaner on 30.1.68. It is alleged that according to that Will, the property described therein was bequeathed for enjoyment of usufruct by Rukhidevi for her lifetime, and after her death, the property was to go to the plaintiff and defendant No.1 in the proportion of 50:50. Rukhidevi is said to have died on 25.5.77. According to the plaintiff, consequently the plaintiff and defendant No.1 became owner of the property in the share of 50:50. It is then alleged, that the probate and the title deeds of the property are with the defendants No.2 to 5, the property is yielding a monthly rent of Rs.126/-, which should have been recovered by the defendant No.2 to 5, but then it has been learnt, that it is the defendant No.1, who is recovering rent, in collusion with his father Badri Dass, whereupon the plaintiff approached the defendants No.2 to 5, who informed, that they did not, in any manner authorise Gopal Ram to receive rent, and they have no objection in paying half share to the plaintiff, but since they have not received the rent, they cannot pay. The plaintiff alleges to have given a notice for partition on 17.2.78, but to no good. The plaintiff has valued the property at Rs.32,000/-, and valuation of Rs.625/- has been put for the share of the rent received, and has filed the suit on a Court fees of Rs.200/-. With these averments, a decree for partition has been prayed for dividing the property by metes and bounds, and for being put in actual physical possession.

The defendant No.1 filed a written-statement, admitting the fact of Gogadevi being the ancestor, and having died, but the allegation of making Will, and appointing defendants No.2 to 5 as executor, was denied, issuance of probate was denied, the effect of Will was denied, fact of Rukhidevi's death was admitted, but then, it was denied that the plaintiff or defendant No.1 are the owners to the extent of 50:50. Likewise, the averment of title deeds, probate etc., being with defendant No.2 to 5 was also denied, and the receipt of rent to the extent of Rs.1260/- was also denied. Then an objection was raised, that since the possession of the property is not with the plaintiff, ad-valorem court fees, was required to be paid. Then in additional pleas it was pleaded, that Gogadevi never executed any Will, and at the time when Gogadevi died, the defendant was 6 years old only, and therefore, if any probate is said to have been obtained, since that was obtained during his minority, and without his being able to contest those proceedings, the probate is not binding on him. Then it was also pleaded, that no part of the property is in his possession, nor has he let out any part of the property, nor any part is in the possession of the plaintiff, rather since 1964, the property is in possession of Badri Dass (his father), who was in possession as owner, and has been realising rent from the tenants by letting out the property to them. It was also contended, that

defendants No.2 to 5 also were never in possession of the property, and Badri Dass has become owner by adverse possession, still he has not been impleaded as party defendant, as such suit suffers from this defect. Another objection raised was, that name of defendant No.1 is Ramgopal and not Gopal Ram, therefore, he has been wrongly described as party.

Learned trial Court framed 10 issues. During trial, voluminous evidence, oral as well as documentary, was produced by the parties.

Deciding issue no.1 and 6 together, being relating to making of the Will, and its probate, and the probate being not binding on the defendant No.1, it was held, that Badri Dass (D.W.2), himself has admitted, that the present plaintiff had initiated proceedings for issuance of probate, wherein he had filed Vakalatnama on behalf of his son, and had also filed reply. Then it was also held, that even if the present defendant was minor at the time of issuance of probate, but then even thereafter as, he has not challenged the probate, even after attaining the majority, within limitation, and that, the father of the defendant had properly safeguarded interests of the defendant minor, as such, the issues were decided against the defendant. Then deciding issue No.2 relating to the question about Rukhidevi being maintained by the executors

from the income of the property, it was held, that from the statements of the tenants, it is clear, that they were paying rent to Gogadevi, and after her death to Rukhidevi, and thus, the issue was decided against the defendant. Then the crucial issue being issue No.3 was decided against the defendant, in view of the findings on issue No.1 and 6, and the parties (plaintiff and defendant No.1) were held entitled to 50:50 share in the property, so also in the income of the property. Then issue No.4 relating to Rs.1260/- having been realised by way of rent, it was held, that plaintiff has not been able to prove as to how much rent is due, for what period, and from which tenant, while the tenants also do not depose to have paid rent to the defendant No.1 or his father. Thus, this issue was decided against the plaintiff. Then deciding issue No.5 relating to court fees it was held, that since it is not established from the evidence of the tenants, that the property was being let out by Badri Dass, or that he was receiving rent, rather Gogadevi was a literate lady, who was herself receiving rent, and the defendant No.1 has clearly deposed, that he does not know, as to whether the property is in possession of plaintiff or himself. Thus, it was found that it is not established, that the plaintiff has been dispossessed, and therefore, the court fees paid was found to be sufficient. Then deciding issue No.7 relating to adverse possession of Badri Dass, it was found, that from the evidence of the defendant himself, it is clear, that he

does not clarify, as to whether Badri Dass had been in possession of the property, though Badri Dass D.W.2 has deposed so, but then, his evidence is not supported by anyone, rather the tenants have contradicted him. In that view of the matter, this issue was also decided against the defendant, and in favour of the plaintiff. Then deciding issue No.8 relating to limitation, it was found, that adverse possession of Badri Dass had not been found, then Rukhidevi died on 25.5.77, while suit has been filed in the year 1978 itself, which is clearly within time. Deciding issue No.9 relating to mis-description of Gopal Ram, it was held, that even in Ex.A-1, the Vakalatnama filed in probate proceedings, the defendant has been described as Gopal Ram, and therefore, the issue was decided against the defendant. In the ultimate result, a decree has been passed as above.

Learned counsel for the appellant, assailing the impugned judgment submitted, firstly, that the court fees paid on the suit is deficit, as the plaintiff has not alleged to be in joint possession of the property, and rather from the averments of the plaint itself, it is clear, that he was excluded from the possession, and therefore, court fees was required to be paid ad valorem. The other submission made is, that the property is in possession of Badri Dass D.W.2, but then he has not been impleaded as party, and therefore, the suit is bad. The next submission made is, that the probate has been obtained

at the time when the appellant was minor, and therefore, that probate is of no consequence against the appellant, and therefore, the impugned decree is bad.

Learned counsel for the respondent on the other hand supported the impugned judgment and decree.

I have gone through the record and have considered the submissions.

Taking up the first submission, regarding court fees, the relevant provision of the Rajasthan Court Fees & Suit Valuation Act is contained in Section 35, which reads as under:

> "35. Partition suit.-(1) In a suit for partition and separate possession of a share in joint family property or of properly owned, jointly or in common by a plaintiff who has been excluded from possession of such property fee shall be computed on the market value of the plaintiff's share of the property.
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> (2) In a suit for partition and separate possession of joint family property or property owned, jointly or in common, by a plaintiff who is in joint possession of such property, fee shall be paid at the following rates namely:
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> (i) Rupees thirty if the value of plaintiff's share is Rs. 5,000 or less;
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> (ii) Rupees one hundred if the value is above Rs.5,000 but does not exceed Rs.10,000; and
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> (iii) Rupees two hundred if such value exceeds Rs.10,000.

> (3) Where, in a suit falling under sub-section (1) or sub-section (2) a defendant claims partition and separate possession of his share of the property, fee shall be payable on his written statement computed on half the market value of his share or at half the rates specified in sub-section (2), according as such defendant has been excluded from possession or is in joint possession.
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> (4) Where, in a suit falling under sub-section (1) or sub-section (2) the plaintiff or the defendant seeks cancellation or decree or other document of the nature specified in section 38, separate fee shall be payable on the relief of cancellation in the manner specified in that section."

The averment in this regard in the plaint is contained in para-7, wherein all that has been alleged is, that the value of the industrial area property is assessed at Rs.30,000/-, while that of the open land outside Sodon Ki Bari is valued at Rs.2000/-, and the share of the property in the rent received is Rs.625/-. Thus, the total valuation of the suit has been put at Rs.16,000/-, and court fees of Rs.200/- is paid. Significantly, there is no averment in the plaint, that the plaintiff is in joint possession of the property, as contemplated by sub-section (2). Rather a look at the averments made in para-5 of the plaint shows, that the rent was being received by the defendant No.1 Gopal Ram in collusion with his father Badri Dass, and was not being received by the executors, thus it shows, the plaintiff to have been excluded from possession, and thus, even on the plaint averments, the matter is better governed by the provisions of sub-section (1),

according to which ad valorem court fees is required to be paid. Obviously, the court fees is required to be paid on valuation of Rs.16,625/-, being the value of half share of the price of the rented property, and the rent said to have been realised by the defendant No.1.

Learned counsel for the respondent also did not seriously contest this aspect, and submitted, that the plaintiff would pay the deficit court fees. Accordingly, the contention of the learned counsel for the appellant is accepted, and it is directed that the plaintiff should pay ad valorem court fees, on the valuation of Rs.16,625/-.

Coming to second contention; the contention proceeds on the basic assumption of fact, about Badri Dass being in possession of the property. True it is, that D.W.2 Badri Dass has deposed to be in possession of the property, as he claims to be letting out the property, getting it repaired, and being in possession of the open land, and to have incurred all the expenditure in performance of last rites of Gogadevi. However, a look at the statement of D.W.1, the defendant himself, does show, that all that has been deposed by him in the examination in chief is, that his father Badri Prasad is receiving rent, however he does not know as to on whose behalf, he is receiving rent "किराया मेरे पिता बद्रीप्रसाद वसूल करते हैं। किराया किसकी ओर से वसूल करते हैं यह पता नहीं।". Likewise, regarding possession, he has deposed "मुझे

पता नहीं कि गोगादेवी की जमीन जायदाद पर मेरा या सहोदरा का कब्जा है या नहीं।". Thus, even the defendant did not assert, while in the witness-box, about the property being in possession of Badri Dass, much less since 1964, and much less as adverse. As against this, the tenant witnesses, being P.W.4 Shiv Narayan, has clearly deposed, that he is a tenant in the property situated in the industrial area for the last 14-15 years. He was paying rent to Gogadevi, and after her death, to her daughter in law, and that he never paid any rent to Gopal Ram or Badri Dass. In cross-examination, he asserted and maintained that he never paid any rent to Badri Dass, who is present in the Court. Likewise, the other tenant witness P.W.5 has also deposed, that he had taken one room on rent from Rukhidevi, and was paying rent to her, being Rs.40/- per month. This room was taken on rent in the year 1973, and he remained tenant till July 1976. He has also deposed, that alongwith Rukhidevi sometime Nathmal, and sometime wife of Nathmal used to come. Then in the cross-examination, he has maintained, that rent was last paid by him to Rukhidevi. He has denied the suggestion about Rukhidevi having died in May 1976. Significantly, this witness has not been suggested, about the rent having been received by D.W.2. Thus, in my view, it is more than clear, that it is not at all established, that D.W.2 Badri Dass is in possession of the property, much less has he acquired, or perfected, his title, by adverse possession. That being the position, non-impleadment of Badri Dass as party in the

suit, is hardly of any consequence. Thus, the contention is required to be, and is, negatived.

Then taking the last contention, about the Will and probate; in my view, from the order of the learned District Judge, Bikaner, available on record as Ex.2, it is clear, that the probate was issued by the learned District Judge. Then Ex.PW3/1 is the original probate, produced on record. Then it has already been admitted by D.W.2, that in probate proceedings, he had given Vakalatanama on behalf of his son Ramgopal (defendant No.1), which is Ex.A/1. Then a look at Ex.A/1 shows, that Vakalatanama was signed by Badri Dass, in his capacity as a guardian of minor Gopal Ram. Thus, the defendant had the knowledge of the probate proceedings. In order to get out of the difficult situation, though defendant No.1 has chosen to depose to be living separately from his father, and to be living with his maternal grandfather, but then, his father D.W.2, has clearly admitted in the very opening of the cross-examination, that his son Ramgopal lives with him, and does not live separately. In this background, the fact remains that the probate, or probate proceedings, had not been challenged by the defendant-appellant, after attaining majority. This is one aspect of the matter. The other aspect of the matter is, that by the probate, appellant did not lose anything, rather he has been bequeathed half share of the property, which otherwise would not come to him by

inheritance or succession. Thus, the appellant rightly appears to have not challenged the probate proceedings. Thus this contention also does not hold good.

The respondents have filed cross-objections, regarding the amount of rents, said to have been received by the defendant No.1. In this regard also, I have gone through the evidence, available on record, and find, that the learned trial Court has rightly decided this issue against the plaintiff, as the tenants have been examined by the plaintiff herself, and they have not deposed to have paid any rent to any of the defendants.

The net result of the above discussion is, that the appeal is devoid of merit, and is, therefore, dismissed with the modification, that before passing of the final decree, the plaintiff will have to pay ad valorem court fees, as observed above. The parties are directed to bear their own costs of this appeal.

(N P GUPTA),J.

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